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Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection by AARON SCHWABACH.

Farnham: Ashgate Publishing Ltd, 2011, vi + 161 + (bibliography + index) 16pp (£55 hardback). ISBN: 978-0-7546-7903-5.

Two key trends characterise contemporary copyright law. The first is the pervasiveness of copyright protection; the second is the ease with which creative works can now be made and distributed online. The pervasiveness of copyright is best illustrated by its duration, which is now set at the life of the author plus 70 years in respect of literary, dramatic, musical and artistic works in many jurisdictions.¹ The European Union even agreed in 2011 to extend the term of copyright in respect of sound recordings and performances from 50 years to 70 years.² This means that the set of works protected by copyright at the end of 2011 included those written by authors who left this Earth in 1941 – so the early 20th century novels of James Joyce and Virginia Woolf, for example, were still protected against copying, adaptation, translation and more under the law of copyright until 1 January 2012.³ Although the person with tens of thousands or hundreds of pounds just lying around can indeed purchase studio equipment, imaging software, and printing presses to produce creative works, anyone with access to a mass-market computer can publish literary works and make them available to a global audience, remix audio and video material and upload it to YouTube, and discuss their work or the work of others on discussion boards, social networking sites and even humble email list. Individuals can simply make and distribute creative works far more freely and easily now than they could in the past.

Where these two trends meet, fascinating but difficult legal questions arise. More works are protected than ever before (and this is not just about duration, but also scope and enforcement), yet there are more opportunities to ‘infringe’ the rights of the original authors than was previously the case. The example of ‘fan fiction’ creates a context in which questions of this kind can be considered, and it is the legal status of ‘fan fiction’ that is the concern of Aaron Schwabach’s monograph, *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* (Ashgate, 2011).

Fan fiction matter has been the subject of a series of articles in (mostly American) law journals and edited collections in recent years⁴ and has also been considered in books on wider themes of change and conflict in copyright law, but Schwabach’s book (based in part on his earlier journal articles) is the only full-length analysis of the status of these works to date. As such, he is simultaneously

¹ Directive 2006/116/EC on the term of protection of copyright and related rights; Copyright, Designs & Patents Act 1988, s 12(2) (UK); Copyright and Related Rights Act, s 24 (Ireland).

² Directive 2011/77/EU on the term of protection of copyright and related rights.

³ A number of organisations collaborate in promoting an annual ‘Public Domain Day’, celebrating those works which are no longer protected by copyright law. Each year, a list of authors so affected is published at <http://www.publicdomainday.org>, and events take place at universities and libraries across the world.

⁴ J Lipton, ‘Copyright’s twilight zone: digital copyright lessons from the vampire blogosphere’ (2010) 70 Maryland Law Review 1; R Tushnet, ‘Copyright law, fan practices and the rights of the author’ in J Grey (ed), *Fandom: identities and communities in a mediated world* (NYU Press, 2007).

defining the contours of academic legal analysis of fan fiction, explaining it to the wider intellectual property community, and reflecting on some of the controversial disputes between authors and fans (and there have been many) whether they have been fully litigated or not. It is a short book, but a very well-referenced one, with extensive footnotes pointing the curious reader towards academic literature, examples of fan fiction, and online discussions, while maintaining a lightness of touch that rewards careful reading.⁵

Who am I to say that the readership of *Legal Studies* does not include some fan fiction authors? Maybe members of the Society of Legal Scholars do indeed spend their late evenings constructing scenarios where Lord Denning and his army of men on the Clapham omnibus fight intergalactic crime,⁶ or reimagining the personal life of Atticus Finch.⁷ Yet it does seem only fair to pause here before going through the wardrobe (or before we leave Kansas, if you prefer), and consider what fan fiction actually is. Fan fiction describes works of fiction (primarily but not exclusively literary) that make use of characters (or other features) from other works of fiction. In some cases, a very substantial number of works of fan fiction can pertain to a single book or series, such as the *Harry Potter* novels by JK Rowling. Much of the fan fiction posted on the Internet is made available on a non-commercial basis, and there are large communities of fan fiction authors and readers. The FanFiction.net site, for example, contains over six million individual works.⁸ Some (but certainly not all) of it falls into the 'slash' category, characterised by sexual, romantic or erotic themes and (depending on how you define the category) same-sex pairings.⁹ Yet as a much-read discussion of fan fiction for the middlebrow audience of *Time* magazine reassuringly put it, 'there's plenty of sex in fan fiction, but it's only a small part of the picture'.¹⁰ Schwabach does acknowledge the complexity of gender and sexuality within fandom, and also the impact that the nature of the fiction may have on the reaction of the authors and their agents, but chooses to focus on issues of general legal principle.

The questions that the author sets himself, then, fall into two neat categories. The first is whether the characters of the original stories are indeed protected by copyright law. In this section, the author demonstrates his comfort with literary history and criticism as well as copyright law, following a line that goes from

⁵ The best example being footnote 80 on page 47, which attaches to the word 'inconceivable' in the main text a beloved quote from the 1987 film *The Princess Bride*. At the time of writing, the scene in question is available on YouTube as a six-second clip:

<http://www.youtube.com/watch?v=G2y8Sx4B2Sk>. Another is the gentle teasing of his own interests in footnote 29 on page 69: 'I could offer pages of examples and argument here, but that's something for a fan forum'.

⁶ Sadly, this is merely this author's hypothetical example. Anyway, this would be RPF (Real People Fiction), a parallel category.

⁷ Actually, there are 431 stories on FanFiction.net based on *To Kill A Mockingbird*:

http://www.fanfiction.net/book/To_Kill_a_Mockingbird/

⁸ Figures published on <http://ffnresearch.blogspot.com>.

⁹ Again in order to provide a good example here, one must guess at the reading habits of the membership of the Society of Legal Scholars, but if I say Kirk/Spock, Holmes/Watson and Harry/Draco, hopefully that causes appropriate bells to ring for most.

¹⁰ L Grossman, 'The boy who lived forever' (*Time* 7 July 2011)
<http://www.time.com/time/arts/article/0,8599,2081784,00.html>

Shakespeare to Nancy Drew to Godzilla to James Bond. He concludes that the direction of travel is in favour of a high level of protection of 'copyright in characters', pointing to the 2009 finding of a District Court¹¹ regarding a book (*60 Years Later: Coming Through The Rye*) which was alleged to violate JD Salinger's copyright in *The Catcher In The Rye* (1951). The two main tests for character copyrightability, that it is 'sufficiently delineated' or alternatively that the character 'constitutes the story being told', are explained and critiqued clearly and fairly.

The second category, assuming the answer to the overarching question of copyrightability in the first category is yes, relates to infringement. Schwabach considers the various exceptions, limitations and defences under copyright law which may operate in favour of the author of fan fiction. The key provisions here (and recalling that we are talking about US law) are those on fair use. The Copyright Act sets out four factors for courts to consider when assessing an argument that fan fiction (or anything else) is fair use and therefore not a violation of the exclusive rights of the author.¹² The four factors are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the market/value of the work. Crucially, latter-day courts have shown a particular interest in how 'transformative' a second work is.¹³ In this chapter, as well as in a later section of the book, we encounter some of the celebrated cases where judges have found themselves trying to make sense of the fair use tests and the substantial jurisprudence and to apply it to novel situations. The dispute between Warner (producers of the Harry Potter films) and Steven Vander Ark (creator of the Harry Potter Lexicon website) is a particularly interesting one.¹⁴ Vander Ark's website is a colossal collection of information on the Harry Potter universe, but he and his publisher (RDR) were the target of an action brought by Warner when they prepared to publish elements of the Lexicon in book form. The court did issue an injunction against Vander Ark and RDR, but as Schwabach explains over a number of pages, the result is not unwelcome within the fan fiction community, as the law was clarified (and favoured fans in many regards) so as to make it possible for Vander Ark and others to continue operating with a heightened and more precise understanding of the impact of copyright law on their various projects. But this book does not limit itself to considering those disputes that have gone before the courts; some of the most compelling passages trace the relationships between authors and their fans, particularly how some authors rely on direct appeals to ethical considerations, but also the way in which authors initially supportive of fan fiction may come to rescind declarations of support at a later stage.

¹¹ *Salinger v Colting* (2009) 64 F Supp 2d 250 (Southern District, New York).

¹² 17 USC §107.

¹³ Much of this can be traced to a journal article: P Leval, 'Toward a Fair Use Standard' (1990) 103 Harvard Law Review 1105, and its use by Justice Souter in *Campbell v Acuff-Rose* (1994) 510 US 569. (This was the second-most interesting thing about Souter's opinion; the most interesting thing was, of course, the inscription in the bound law books of the lyrics of 2 Live Crew's alternative version of *Pretty Woman* that so exercised the author of the original).

¹⁴ *Warner Bros v RDR Books* (2008) 575 F Supp 2d 513 (Southern District, New York).

Although this is a book about the law of the United States, it offers valuable information to those of us in the UK and Ireland who are engaged in debates on the reform of copyright law. Reviews in the UK chaired by Andrew Gowers (in 2006)¹⁵ and Prof. Ian Hargreaves (in 2011)¹⁶ both recommended changes to exceptions in copyright law. They particularly criticise the lack of a 'parody' exception in UK law, despite it being expressly permitted under the terms of the relevant European directive,¹⁷ and call for a new statutory exception to be introduced. The Hargreaves Review was specifically asked to consider the question of fair use, but concluded that a series of statutory exceptions would be a more feasible recommendation.¹⁸ In the Republic of Ireland, a Copyright Review Committee chaired by Dr. Eoin O'Dell will report in 2012.¹⁹ It too has been asked to report on fair use, but also to give particular consideration to the relationship between copyright and innovation. *Fan Fiction and Copyright* does not set out to make this case, nor is it a critique of the difference between fair use and fair dealing, but the depth of the author's knowledge about the fan fiction 'scene' does serve as a good argument of what a less protective approach to the exclusive rights of the first author (whether through fair use or otherwise) might facilitate, in cultural terms as well as the development of new business models.

The other theme touched upon in this book, but continuing to develop in the period between its publication and the publication of this review, is that of non-written forms of fan fiction. The author does consider (in brief) 'other media', including art, music and in particular, video. Indeed, the ease with which videos can be produced and distributed is demonstrating the limits of copyright law. A video, by its very nature, may well include a range of different sources, engaging all sorts of different facets of copyright law. To complicate things further, some sites have introduced identification and monitoring systems to deal with the problems of blatant copyright infringement. These systems are designed to make it easier to locate and remove infringing works, but they are not perfect, and can 'overreach' by blocking or removing videos potentially protected under doctrines such as fair use. Hosts in the US and European Union are also required to comply with systems of 'notice and takedown' to avoid liability, meaning that a host has a strong incentive to act on requests from rightsholders and little incentive to take the side of the user. As such, fan fiction remains vulnerable to challenge, even if in accordance with the law.

Schwabach rightly goes beyond considering the impact of law on the publication of fan videos, discussing the legal obstacles to *making* them, and how the rulemaking process provided for under the Digital Millennium Copyright Act²⁰ led to a new exemption for certain uses of encrypted DVDs so as to 'incorporate short portions of motion pictures into new works for the purpose of criticism or

¹⁵ <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

¹⁶ 'Digital Opportunity: a review of intellectual property and growth' <http://www.ipso.gov.uk/ipreview-finalreport.pdf>

¹⁷ Directive 2001/29/EC on the harmonisation of certain aspects of copyright law in the information society, article 5(3)(k).

¹⁸ 'Digital Opportunity', chapter 5.

¹⁹ http://www.diei.ie/science/ipr/copyright_review_2011.htm

²⁰ 17 USC §1201(a)(1).

comment' in non-commercial videos. The author of this review would like to have read more about Schwabach's views on machinima (works created using video games, virtual worlds or similar software), which has emerged as another site of conflict between rightsholders on the one hand and fans and other creators on the other.²¹

This book comes at an important time for the law of copyright. Taken together with works like Kembrew McLeod & Peter DiCola's wide-ranging *Creative License: the law and culture of digital sampling*²² and William Patry's cri de couer, *Moral Panics and the Copyright Wars*,²³ *Fan Fiction and Copyright* is an essential part of the reading list for those considering the future direction of copyright law outside of the United States, as well as a thorough source of information on many cultural and legal aspects of fan fiction in that jurisdiction. It may deal with a phenomenon which will baffle some audiences who might wonder why anyone would bother to write stories about stories, but in a time when the Internet offers opportunities for audiences to be engaged in a dialogue with authors and with fellow fans, the true question is 'why not?'

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²¹ R Jones, 'From shooting monsters to shooting movies: machinima and the transformative play of video game culture' in K Hellekson (ed), *Fan fiction and fan communities in the age of the Internet* (McFarland, 2006); G Reynolds, 'All the game's a stage: machinima and copyright in Canada' (2010) 13 *Journal of World Intellectual Property* 729; see also the special issue of the *Journal of Visual Culture*, volume 10(3) (2011).

²² Duke University Press, 2011.

²³ OUP, 2009.